Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

SOCAL COMMUNICATIONS SITES, LLC,

Petitioner,

v.

L. DARRELL & PATRICIA F. BEVAN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a United States Bankruptcy Court is required to dismiss a Chapter 13 case upon the request of the debtors pursuant to 11 U.S.C. §1307(b), notwithstanding the prior pendency of an unopposed motion to convert the case to a case under Chapter 7 (pursuant to 11 U.S.C. §1307(c)) filed by a creditor.

LIST OF ALL PARTIES

The only parties who participated in the proceedings in the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit Court of Appeals") which gave rise to this petition were the petitioner and respondents named on the front cover of this petition.

CITATIONS TO PREVIOUS DECISIONS

Socal Communications Sites, LLC v. L. Darrell Bevan and Patricia F. Bevan (In re L. Darrell Bevan and Patricia F. Bevan), ____F.3d_____, 2002 WL 1342906 (9th Cir. 2002) (Unpublished decision to be reported in Table).

STATEMENT OF THE BASIS OF JURISDICTION

This petition is made with respect to a Memorandum decision of the Ninth Circuit Court of Appeals, entered on June 19, 2002. In accordance with Rule 13 of the Rules of this Court, this petition has been filed within ninety (90) days of the entry of the Ninth Circuit Court of Appeals' order.

Jurisdiction in this matter is based upon 28 U.S.C. §1254, which provides, *inter alia*, that "Cases in the courts of appeals may be reviewed by the Supreme Court . . . [by] writ of certiorari granted upon the petition of any party to any civil

or criminal case, before or after rendition of judgment or decree."

STATUTORY PROVISIONS AT ISSUE

This petition seeks the Court's interpretation, and harmonization, of the provisions of 11 U.S.C. §1307(b) and (c), which provide as follows:

> (b) On request of the debtor at any time, if the case has not been converted under section 706, 1112 or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.
>
> (c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including–
>
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
>
> (2) nonpayment of any fees and charges required under chapter 123 of title 28;
>
> (3) failure to file a plan timely under section 1321 of this title;
>
> (4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

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STATEMENT OF FACTS

This petition arises out of a Chapter 13 (11 U.S.C. §1301, *et seq.*) bankruptcy case filed by Respondents on December 10, 1998, in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court"). Respondents' Amended Chapter 13 Plan ("Plan") was filed with the Bankruptcy Court on April 28, 1999, and it was confirmed by a confirmation order entered on July 8, 1999 ("Confirmation Order"). As modified by the Confirmation Order, the Plan provided for Respondents' payment to the Chapter 13 trustee ("Trustee") of payments of $1,089.00 per month, resulting in a one hundred percent (100%) distribution to all creditors.

Petitioner is a creditor of Respondents, with a general unsecured claim of $61,694.50. By the time of the entry of the Bankruptcy Court's order which is the subject of this petition, however, Petitioner had yet to receive any payment whatsoever on its allowed claim. In fact, as of that date, Respondents had not made <u>any</u> payments into the Plan for over one (1) year, or since November 8, 1999. Furthermore, Respondents' Plan was supposed to be funded in large part with contributions from Respondents' family, but Petitioner had determined, and irrefutably demonstrated to the Bankruptcy Court, that Respondents were diverting the family contributions to the funding of litigation on behalf of Respondents which was occurring outside of the Bankruptcy Court. Petitioner argued, therefore, that cause existed to convert the Respondents' case to a case under Chapter 7 of the Bankruptcy Code pursuant to 11 U.S.C. §1307(c).

Respondents did not actively oppose Petitioner's motion to convert. Rather, on the day before the hearing on Petitioner's motion, Respondents filed with the Bankruptcy Court a request to dismiss their case pursuant to 11 U.S.C. §1307(b). Then, at the hearing on Petitioner's motion, the Bankruptcy Court ruled <u>as a matter of law</u> that Respondents were entitled to dismiss their case at any time,

notwithstanding the fact that cause might exist to convert their case to a case under another chapter of the Bankruptcy Code. Accordingly, the Bankruptcy Court dismissed Respondents' case without even considering Petitioner's motion to convert.

Petitioner timely appealed the Bankruptcy Court's order dismissing Respondents' Chapter 13 case to both the United States District Court for the Central District of California (the "District Court") and the Ninth Circuit Court of Appeals, each of which affirmed the decision of the Bankruptcy Court. Petitioner now seeks certiorari, so that this Court may review the decision of the Ninth Circuit Court of Appeals.

ARGUMENT IN FAVOR OF THE GRANTING OF CERTIORARI

Petitioner respectfully submits that the granting of certiorari is appropriate and necessary in this case. As is set forth in Rule 10(a) of the Rules of this Court, certiorari may be granted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." In this case, the Ninth Circuit Court of Appeals, in affirming the Bankruptcy Court, has held that "the 'debtor has an absolute right to dismiss a Chapter 13 petition.'" *Appendix, at* 2, quoting, Nash v. Kester (In re Nash), 765 F.2d 1410, 1413 (9th Cir.1985). In so holding, however, the Ninth Circuit Court of Appeals is at odds with several other Courts of Appeal.

In all, four (4) other Circuit Courts have addressed the foregoing issue since the publication of Nash. Two (2) Courts – the Eleventh Circuit and the Eighth Circuit – have found the rationale of Nash, as more fully explicated in In re Beatty, 162 B.R. 853 (9th Cir. BAP 1994), to be wholly unpersuasive. See, In re Graven, 936 F.2d 378, 384-87 (8th Cir.1991) and In re Molitor, 76 F.3d 218, 219 (8th Cir.1996); In re Cotton, 992 F.2d 311, 313 (11th Cir.1993). A third Court, the Fifth Circuit Court

of Appeals, did not itself write on the subject, but it did affirm an opinion to the same effect by the United States District Court for the Northern District of Texas. Furthermore, when this Court was asked to review the Fifth Circuit's decision, it chose to let the decision stand. In re Foster, 121 B.R. 961 (Bkrtcy. N.D. Tex. 1990), aff'd without opinion, 945 F.2d 400 (5th Cir.1991), cert. denied by, Foster v. North Texas Production Credit Ass'n, 502 U.S. 1074, 112 S.Ct. 972, 117 L.Ed.2d 136 (1992).

On the other hand, one (1) other Circuit Court - the Second Circuit Court of Appeals - has taken a position which is in agreement with the Ninth Circuit Court of Appeals. See, In re Barbieri, 199 F.3d 616, (2nd Cir. 1999).

In reaching their respective holdings, all of the foregoing Courts wrestled with significant issues. On the one hand, the Fifth, Eighth and Eleventh Circuits expressed concern that, in ruling that a Chapter 13 debtor may "trump" a potentially merited conversion to a case under Chapter 7 by filing an "eleventh hour" request for dismissal under 11 U.S.C. §1307(b), section 1307(c) could be rendered "a dead letter and ... the bankruptcy courts [would be opened up] to a myriad of potential abuses." In re Molitor, supra, 76 F.3d at 220. On the other hand, the Second Circuit noted in the Barbieri case that, "[t]o allow a creditor to convert a Chapter 13 case to a Chapter 7 liquidation notwithstanding a pending motion to dismiss filed by the debtor would permit the creditor to effectuate an involuntary petition without the need to satisfy the requisites of § 303. . . . Such a result flies in the face of the voluntary nature of [Chapter 13] and circumvents the standards for an involuntary liquidation set forth in § 303." 199 F.3d at 620, quoting, In re Patton, 209 B.R. 98, 102-103 (Bkrtcy. E.D. Tenn. 1997).

Clearly, these questions are of the utmost importance, as they go to the very heart of what Congress intended in creating the Chapter 13 scheme of bankruptcy relief. It is

essential, therefore, that this Court "weigh in" on the matter at this time, and thereby resolve the conflict between the Circuits.

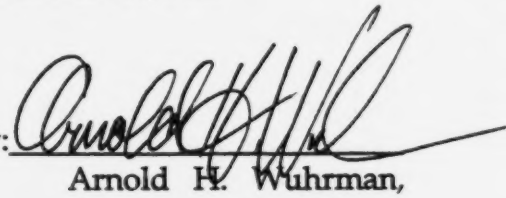
CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that certiorari may, and should, be granted herein, so that this Honorable Court may resolve the conflict between the Second and Ninth Circuits' Courts of Appeal on the one hand, and Fifth, Eighth and Eleventh Circuits' Courts of Appeals on the other.

Respectfully submitted,

Dated: June 25, 2002

LAW OFFICES OF ARNOLD H. WUHRMAN, P.C.

By: 

Arnold H. Wuhrman, Attorney for Socal Communications Sites, LLC, Petitioner

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PETITIONER'S APPENDIX

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Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, entered June 19, 2002 1

Slip Copy
Unpublished Disposition

(Cite as: _____ F.3d _____; 2002 WL 1342906 (9th Cir. (Cal.))
(Only the Westlaw citation is currently available)

NOTICE: THIS IS AN UNPUBLISHED OPINION. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

United States Court of Appeals, Ninth Circuit.

IN RE: L. DARRELL BEVAN; IN RE: PATRICIA F. BEVAN, DEBTORS;
SOCAL COMMUNICATIONS SITES, LLC, Plaintiff-Appellant,
v.
L. DARRELL BEVAN; PATRICIA F. BEVAN, Defendants-Appellees.

No. 01-56033.
D.C. No. CV-00-00931-VAP.

Submitted June 6, 2002 [FN**].

FN** The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

Decided June 19, 2002.

Appeal from the United States District Court for the Central District of California Virginia A. Phillips, District Judge, Presiding.

Before FERNANDEZ, WARDLAW, and W. FLETCHER, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Socal Communications Sites, LLC, appeals the district court's decision affirming the bankruptcy court's determination that debtors L. Darrell Bevan and Patricia F. Bevan had an absolute right to voluntarily dismiss their Chapter 13 bankruptcy petition. We affirm.

The bankruptcy court was correct because 11 U.S.C. § 1307(b) provides that "[o]n the request of the debtor at any time, if the case has not been converted ..., the court shall dismiss a case under this chapter," and we have said that means that the "debtor has an absolute right to dismiss a Chapter 13 petition." *Nash v. Kester (In re Nash)*, 765 F.2d 1410, 1413 (9th Cir. 1985); *see also Beatty v. Traub (In re Beatty)*, 162 B.R. 853, 857 (B.A.P. 9th Cir. 1994). Even though Socal Communications had moved to convert, the Bevans made their request for dismissal before conversion took place.

AFFIRMED.